

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2000-0237-E - ORDER NO. 2000-816
OCTOBER 5, 2000

IN RE: Borg-Warner Automotive Fuel Systems Corporation,)	ORDER DENYING
)	MOTION TO DISMISS
)	
Complainant/Petitioner,)	
)	
vs.)	
)	
Duke Power,)	
)	
Respondent/Defendant.)	

INTRODUCTION

On May 11, 2000, Borg-Warner Automotive Fuel Systems Corporation ("Borg-Warner") filed a Complaint with the Public Service Commission of South Carolina ("Commission") against Duke Power n/k/a Duke Power, a division of Duke Energy Corporation ("Duke"). The Complaint alleges that Duke threatened Borg-Warner with termination of service if Borg-Warner did not install certain equipment at Borg-Warner's expense. By its Complaint, Borg-Warner seeks to bring this matter before the Commission for determination of which party should bear the cost of the equipment.

Pursuant to Commission's Rules of Practice and Procedure Reg. 103-841, the Commission's Executive Director served a copy of the Complaint on Duke. Thereafter, Duke timely filed a Motion to Dismiss the Complaint. By Order No. 2000-521, dated June 23, 2000, the Commission set the Motion to Dismiss for oral argument. Oral

arguments on the Motion to Dismiss were held before the Commission of August 22, 2000. The Honorable William Saunders, Chairman, presided. Richard L. Whitt, Esquire and Jefferson D. Griffith, III, Esquire, represented Duke; Francis P. Mood, Esquire, represented Borg-Warner; and Florence P. Belser, Deputy General Counsel, represented the Commission Staff.

POSITIONS OF THE PARTIES

By its Motion to Dismiss and its oral argument before the Commission, Duke asserts two grounds upon which Borg-Warner's Complaint should be dismissed. First, Duke asserts that Borg-Warner's Complaint should be dismissed pursuant to SCRCP Rule 12(b)(6) for failure to state a cause of action. Second, Duke argues that Borg-Warner's Complaint should be dismissed pursuant to SCRCP 12(b)(1) for lack of subject matter jurisdiction.

With regard to Duke's Motion pursuant to SCRCP 12(b)(6), Duke alleges that Borg-Warner's Complaint is legally insufficient on the face of the complaint. Duke asserts that the only allegation of improper behavior by Duke is that "... Duke Power has refused to contribute." Motion to Dismiss, Motion Pursuant to Rule 12(b)(6), ¶ I. Duke contends that Borg-Warner's Complaint provides no allegations that Duke is legally required to contribute to Borg-Warner's expenses and cites no statutory or regulatory authority showing that Duke is required to "contribute" as alleged in the Complaint. Therefore, Duke claims that Borg-Warner's Complaint is legally insufficient to maintain the cause of action before the Commission.

Duke further alleges that Borg-Warner has failed to plead facts sufficient to support an actionable claim against Duke. Duke states in its Motion to Dismiss that “Borg-Warner purports to assume the rights of Carolina Tank, which Borg-Warner describes as, ‘... a predecessor of Borg-Warner’s in the building in question, to install two projection welders.’ ... Importantly, Borg Warner does not claim, or allege facts for this Commission showing that it is a successor in interest to Carolina Tank in alleged consultations between Carolina Tank and Duke Power, which Borg-Warner relies on in the Complaint to establish a claimed basis for its Complaint.” Motion to Dismiss, Motion Pursuant to Rule 12(b)(6), ¶ II. Duke describes Borg-Warner’s allegations as “hearsay allegations, of which this Commission should take no notice.” Motion to Dismiss, Motion Pursuant to Rule 12(b)(6), ¶ II.

As to Duke’s Motion to Dismiss pursuant to SCRCP 12(b)(1), Duke contends that the Commission does not have jurisdiction over the subject matter of the Complaint. First Duke alleges lack of subject matter jurisdiction due the expiration of the applicable statute of limitations. Duke argues that even assuming, for purposes of this Motion, that Borg-Warner is the successor in interest to Carolina Tank the statute of limitations for the Complaint has expired. Duke asserts that Carolina Tank knew or should have known of power quality complaints on April 22, 1997, when Carolina Tank complained to Duke about “dips lights” when the on-site welders were operated. Motion to Dismiss, Motion Pursuant to Rule 12(b)(1), ¶ I and Exhibit “A” to Motion to Dismiss. As Borg-Warner filed its Complaint on May 11, 2000, Duke argues that the Complaint was filed outside the applicable three-year statute of limitations.

Second, Duke asserts that the Complaint should be dismissed pursuant to SCRCP 12(b)(1) because Borg-Warner has failed to plead any facts alleging jurisdiction of the Commission over the subject matter. Duke argues that Borg-Warner seeks money damages and that the Commission may not award money damages. Motion to Dismiss, Motion Pursuant to Rule 12(b)(1), ¶ II.

Borg-Warner filed a Response to Motion to Dismiss and by its Response and its oral argument asserts that its Complaint has alleged a prima facie claim against Duke. Borg-Warner asserts that “it is not necessary to offer proof of this claim in connection with the assertion of allegations in a complaint.” Response to Motion to Dismiss, ¶ 1. Further, Borg-Warner offers that its Complaint alleges that Duke has demanded that Borg-Warner incur expenses for the acquisition and installation of equipment under threat of termination of electrical services and that such practices of a regulated utility are matters appropriately before the Commission. Response to Motion to Dismiss, ¶ 2-4.

Concerning Duke’s assertions under SCRCP 12(b)(1), Borg-Warner disputes Duke’s contention as to when the applicable statute of limitation period would commence. Response to Motion to Dismiss, ¶ 6. Further, Borg-Warner contends that “the Commission has subject matter jurisdiction to supervise Duke’s provision of service to its customers and the requirements which it imposes on its customers.” Response to Motion to Dismiss, ¶ 9.

The Commission Staff participated at the oral arguments on the Motion to Dismiss. The Commission Staff urged the Commission to deny the Motion to Dismiss and to proceed to a merits hearing. Staff opined that the Complaint sufficiently alleges a

cause of action in that the Complaint calls into question whether a certain action, that is a utility requiring a customer to put in certain facilities or face termination of service, by the utility is unjust and unreasonable. Further, Staff asserted that the action complained of would potentially affect the service rendered by the utility to the customer. Staff offered that only after a full evidentiary hearing would the Commission be able to make a proper determination as to whether the action complained of was just and reasonable or not. Staff also asserted that the Complaint contained novel issues involving interpretation of Commission regulations and that the Commission should proceed to a merits hearing on the Complaint on that basis.

DISCUSSION

Based upon the pleadings filed and the oral arguments of the parties, the Commission makes the following determinations:

1. The Commission finds that the complaint of Borg-Warner sets forth sufficient facts to allege an actionable claim against Duke before the Commission. As acknowledged by the parties at oral argument before the Commission, the standard to apply in deciding a motion to dismiss under Rule 12(b)(6) is:

[a] ruling on a Rule 12(B)(6) motion to dismiss [for failure to state a cause of action] must be based solely upon the allegations set forth on the face of the complaint. The motion cannot be sustained if facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to any relief on any theory of the case. The question is whether in the light most favorable to plaintiff, and with every doubt resolved in her behalf, the complaint states any valid claim for relief. The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.

Dye v. Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995).

A review of the Complaint reveals that Borg-Warner has made the following allegations in its Complaint:

- a. That in 1995, Carolina Tank, a predecessor of Borg-Warner's in the building in question, made the decision to install two projection welders in its plant.
- b. That prior to installing the welders, Carolina Tank consulted with Duke as to the electrical facilities the welders would require, and that Duke recommended that Carolina Tank install a 1000 KVA transformer to provide separate electrical service to the welders.
- c. That Carolina Tank followed the recommendations of Duke and in November 1995, had a 12.5 KV/.48KV, 1000 KVA padmount transformer installed to provide electrical power for the welders.
- d. That Carolina Tank thereafter installed two projection welders in 1995, which are the same two projection welders currently in use at Borg-Warner.
- e. That Borg-Warner's electrical needs are supplied from a feeder line that also serves other Duke customers in the vicinity of Rock Hill and Lake Wiley, South Carolina.
- f. That in the last four or five years, there has been significant industrial, commercial, and residential development and population growth in the Rock Hill-Lake Wiley service areas.
- g. That Duke's election to serve the increased development and population growth in the Rock Hill-Lake Wiley service areas from the subject feeder line

has resulted in that line carrying a higher load, as a percentage of the line's total capacity, than it did in 1995.

- h. That in or about May 1999, Duke informed Borg-Warner that Duke was receiving complaints from customers down-line from Borg-Warner and that Duke demanded that Borg-Warner install a VAR compensator, at Borg-Warner's expense, to mitigate those complaints or face termination of its electrical service.
- i. That Borg-Warner has ordered a VAR compensator and will spend approximately Ninety-Seven Thousand, Five Hundred (\$97,500) Dollars for the purchase of the compensator and Twenty-Seven Thousand, Five Hundred Twenty-Five (\$27,525) Dollars for its installation.

The above-cited allegations, as summarized from the Borg-Warner Complaint, are just that, allegations. Borg-Warner must present evidence at a hearing to prove those allegations. Borg-Warner is not required to provide proof of the allegations in its Complaint. Duke asserts that Borg-Warner has not stated any basis in its complaint that would make Duke responsible for the relief which Borg-Warner seeks in its complaint, namely indemnification of the costs of purchasing and installing the VAR compensator. The Commission disagrees with Duke's assertion. Resolving all facts alleged and inferences in the light most favorable to Borg-Warner, the non-moving party, the Commission finds that Borg-Warner has alleged facts sufficient to state a cause of action. Borg-Warner has alleged that it purchased and was installing the VAR compensator under threat of termination of electrical service. The termination of service

by a utility is governed by the Rules and Regulations of the Commission. The Commission believes that a Complaint alleging action taken and expenditures of money to purchase equipment to avoid termination of service is a matter that falls within the jurisdiction of the Commission. The Commission therefore finds that the Complaint sufficiently alleges a cause of action upon which relief could be granted.

2. The Commission finds that Borg-Warner has stated sufficient facts to allege that it, Borg-Warner, has a cause of action against Duke. Duke asserts that Borg-Warner has failed to plead sufficient facts alleging that Borg-Warner has an actionable claim. The Commission disagrees with Duke's position. Borg-Warner has alleged that Carolina Tank after consultation with Duke installed a transformer to serve the welders, that Borg-Warner is the successor in interest to Carolina Tank, that the building in question is the same, and that the projection welders currently in use are the same projection welders used by Carolina Tank. These are facts that Borg-Warner will be required to prove at a hearing on the merits. If Borg-Warner is unable to provide proof to sustain these allegations at a merits hearing, then the Commission will deal with that matter at that time. But for purposes of a Motion under Rule 12(b)(6), SCRCF, where the Commission must construe the facts alleged and inferences therefrom in favor of the non-moving party, the Commission finds that Borg-Warner has alleged sufficient facts to establish that it is the proper party to bring this Complaint.

3. The Commission finds that it has subject matter jurisdiction over the subject matter of the Complaint filed herein. Duke asserts that the Commission lacks subject matter jurisdiction over the Complaint. Duke argues that the Complaint seeks

money damages and that the Commission has no authority to determine or award money damages. By the prayer of its Complaint, Borg-Warner states that it seeks “indemnification” for the costs incurred in purchasing and installing the VAR compensator. At oral argument, Borg-Warner phrased the question before the Commission as between the utility and the customer who should bear the expense of the VAR compensator.

“Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong.” City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). The matter before the Commission is a determination of whether it is the obligation of the utility or the customer to provide the equipment being required by the utility. Commission Rules and Regulations speak to this issue. Reg. 103-363(1)(C) provides that:

Where a separate transformer or other additional electrical utility standard equipment or capacity is to be used to eliminate fluctuations or other effects detrimental to the quality of service to other customers due to welding or x-ray equipment, etc., the electrical utility may make a reasonable charge for the transformer, equipment and line capacity required. In lieu of the above, the electrical utility may require the customer to either discontinue the operation of the equipment causing the disturbance or install the necessary motor generator set or other apparatus to eliminate the disturbance detrimental to the service of other customers.

Additionally, Reg. 103-380 provides that “[e]ach electrical utility shall provide the best possible service that can be reasonably expected from the facilities of that electrical utility. When the quality or quantity of service falls below what can be reasonably expected, the electrical utility shall, as soon as practicable, provide the proper service.”

While the case on the merits may require the Commission to interpret and apply these two regulations, for purposes of the Rule 12(b)(1) Motion, these regulations illustrate that matters involving which party should bear the cost of certain equipment falls within the jurisdiction of the Commission. Thus the Commission finds that it has subject matter jurisdiction over the Complaint filed by Borg-Warner.

4. The Commission finds that the Complaint should not be dismissed pursuant to Duke's argument that the statute of limitations has expired. Duke alleges that the matter alleged by the Complaint was not filed within the applicable three-year statute of limitations. Duke alleges that the statute of limitations should have commenced upon Carolina Tank, Borg-Warner's successor in interest, filing a complaint with Duke about "dimming" or "dipping" lights when the welders were operated. Borg-Warner asserts that the statute of limitations should have commenced when Duke informed Borg-Warner of the need to install a VAR compensator in May 1999. Clearly, a dispute exists as to when the statute of limitations began. While the determination of when the statute of limitations began to run will need to be determined, the Commission finds there is not sufficient evidence before it to make that determination of when the statute of limitations commenced. Therefore, the Commission denies Duke's Motion to Dismiss on the ground that the statute of limitations has run. Of course, Duke is free to plead the expiration of the statute of limitations as an affirmative defense to this matter when it files its Answer to the Complaint.

CONCLUSION

Based upon the findings by the Commission as discussed above, IT IS
THEREFORE ORDERED THAT:

1. The Motion to Dismiss filed by Duke is denied.
2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION.

Chairman

ATTEST:

Executive Director

(SEAL)